No. 84-1517 (2)

Office-Supreme Court, U.S.
FILED
MAY 24 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1984

IN THE MATTER OF THE PETITION

OF

THOMAS M. FAHEY, as Operator of Castle Rest Nursing Home,

Appellant,

against

DAVID AXELROD, M.D., as Commissioner of Health of the State of New York,

Appellee,

For a Judgment Pursuant to CPLR Article 78.

ON APPEAL FROM THE NEW YORK APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT

MOTION TO DISMISS OR AFFIRM

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Dated: May 17, 1985

BEST AVAILABLE COPY

Question Presented.

Whether a substantial federal question is presented by the refusal of state courts to vacate an order revoking appellant's nursing home operating certificate and to reopen the underlying administrative proceeding where (1) appellant's counsel defaulted in appearing at the administrative proceeding after adequate notice and (2) such courts determined that appellant lacked a meritorious defense as to such revocation and that such default was inexcusable?

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Appellant,

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ON APPEAL FROM THE NEW YORK APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT

MOTION TO DISMISS OR AFFIRM.

Preliminary.

Appellant argues that this Court has jurisdiction because "there is a substantial Federal interest in the procedures by which the several states affect existing licenses (J.S., p 11) and that "the denial of an adjournment frustrated the appellant's opportunity to confront * * *, to question * * * and to present the appellant's side of the case" (J.S., p 13).

Appellee's position is that the questions that appellant posits cannot properly be reached by the Court because appellant was foreclosed from pursuing them in State court by reason of his default in appearing in an administrative proceeding after adequate notice. Thus, appellee moves the Court to dismiss the appeal on the ground that it is manifest that it fails to present a substantial federal question or, indeed, any federal question.*

Statement of the Case.

Appellant is the operator of Castle Rest Nursing Home. Nursing homes may be operated in New York by a person who has received both Public Health Council establishment (New York Public Health Law § 2801-a) and an operating certificate from the State Commissioner of Health (*see* New York Public Health Law § 2806). In 1966, appellant had been established as a partner with his then partners. When that partnership was dissolved, it became necessary for appellant to obtain Public Health Council

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*While in some cases the validity of a statute as applied may provide a basis for a direct appeal (*see Cohen v. California*, 403 US 15, at 17 and 18 [1971] and *Dahnke Walker Milling Co. v. Bondurant*, 257 US 282, at 288 and 289 [1921]), we question whether an appeal lies in this case in which appellant merely challenges action taken by the Administrative Law Judge under the authority of an enabling statute.

approval for his establishment as a sole proprietor. On November 19, 1976, after an administrative hearing, the Public Health Council disapproved that application for two reasons. The first was that appellant had not demonstrated that he had the character to operate the facility since he had been convicted of filing false and fraudulent income tax returns. The second was that he had not demonstrated that there were adequate financial resources to operate the facility (388).* Appellant obtained review of that order before the New York Appellate Division, Third Judicial Department, which in a July 22, 1982 decision held that the determination of the Public Health Council was supported by substantial evidence (*see Fahey v. Public Health Council, Dept. of Health of the State of New York*, 89 AD2d 702, 453 NYS2d 822 [3d Dept], *appeal dismissed* 58 NY2d 778, 445 NE2d 216 [1982]).

Because appellant lacked the requisite establishment, the Department instituted proceedings to revoke his operating certificate. The December 21, 1982 Notice of Hearing (57), in the instant case, informed appellant that a determination would be made pursuant to New York Public Health Law § 2806 whether to revoke his operating certificate or to levy fines and/or civil penalties. The Statement of Charges charged and alleged:

> "[T]hat the Respondent [appellant here] has failed to comply with the provisions of Article 28 of the Public Health Law by owning and operating a nursing home without having the requisite establishment approval from the Public Health Council in violation of Public Health Law, § 2801-a" (60, 61).

*These references are to the Record on Appeal below.

The Notice of Hearing informed appellant that "whether or not the Respondent appears at the hearing, the hearing will proceed." (58)

The hearing was to commence on February 8, 1983 (57). It actually commenced, however, on April 26, 1983 (64). There were two adjournments (66). The first was occasioned by the weather. When the second adjournment was sought by appellant's attorney and granted, the Administrative Law Judge required the filing of an affidavit of engagement of counsel. *Idem.* Counsel had declined to file such an affidavit because of what he termed the "serious sensitive nature [of the matter] in Federal Court" (67). At the April 26, 1983 hearing, counsel for the Department stated that:

> "Mr. White: Your Honor, I would just like to briefly address myself to that point as well. I will note for the record [sic] as I did in correspondence to yourself and copies to Mr. Scaccia that I spoke to him on the date of the last hearing and the number that I reached him at was in Syracuse. I understand Mr. Scaccia that he was actually engaged in a proceeding in Burlington, Vermont. I am at a loss as [sic] how I reached him at a Syracuse number when he was actually engaged in a proceeding in Burlington, Vermont." (69, 70)

As to the merits, the Department asked the Administrative Law Judge to take notice of the prior Appellate Division decision and stated "that the defense which Mr. Scaccia has indicated he will be raising has been previously been [sic] disposed of and collateral estoppel should bar the litigation * * *" (140, 141).

Counsel for the Department, after presenting arguments in support of the proposition that appellant had not been approved as a sole proprietor of the Castle Rest Nursing Home and that the subject administrative proceeding was barred by collateral estoppel (142), rested on behalf of the Department (144).

Counsel for appellant did not present witnesses on April 26, 1983. Rather, he argued in support of the proposition that appellant possessed the requisite establishment.* Departmental counsel reiterated his position that every point appellant was arguing had previously been argued before the Appellate Division in the prior litigation. The Administrative Law Judge stated that she would look at the briefs and record in the prior matter (171, 179).

At the conclusion of the proceedings on April 26, 1983, the Administrative Law Judge suggested May 18 for the next date. Counsel for appellant stated that he was scheduled to be in federal court on the 16th and that he did not know how long that engagement would last (185). June 2, when proffered by the Administrative Law Judge, however, was accepted by counsel who stated "[t]hat is fine by my calendar" (185). It was not, however, until June 15, 1983 that the administrative proceeding reconvened. There was no appearance by appellant or his attorney.

At the hearing on June 15, the Administrative Law Judge traced the history of the proceeding, noting that while it was originally to commence February 8, 1983, there had been an adjournment to March 23, 1983 because of the weather and that "[t]he day before the hearing was

*Throughout the hearing, Mr. Scaccia, counsel for appellant, asserted that appellant was, indeed, established because he had received prior establishment as a partner.

commenced I received a call from Mr. Scaccia informing me that he was engaged in another matter" and he requested an adjournment. She granted that request and asked for an affidavit of engagement. She stated that the hearing was rescheduled to April 26 and that she had "still not received his affidavit of actual engagement at that session" (38).

The Administrative Law Judge stated that the day before the June 2, 1983 reconvening date, counsel had called her and informed her that he was to be in the United States District Court in Vermont on a grand jury matter. She required that an affidavit of actual engagement be filed with her by ten o'clock on the morning of June 2, 1983 for the adjournment to be granted. It was delivered by Federal Express (48). She rescheduled the matter for June 15 after directing her secretary to inform counsel by telephone that the matter had been so rescheduled. At the June 15 hearing, she said:

> "Yesterday, June 14, 1983, at approximately 3:15 in the afternoon I received a phone call from Dante Scaccia who inquired as to whether I had received his affidavit of actual engagement. At that time not only had I not received Mr. Scaccia's affidavit, I had no inkling that he would not be present at the hearing. In the phone call that I had with Mr. Scaccia he informed me that he hadn't received my letter until five days after mailing and that he hadn't been in the office at all during the week of June 6th, and returned to the office on June 10th at 6:30, too late to call for a request for adjournment. He informed me he was a solo practitioner, that his secretary was 'a new girl', and not entrusted with opening mail and that on June 15 he was scheduled to appear on an order to show cause in Ithaca.

"I informed Mr. Scaccia that he had notice of the rescheduled date of hearing since June 2, and even if the mail had been delayed and not received until June 10 that I had received no request for adjournment prior to his eleven-hour inquiry regarding the receipt of his affidavit of actual engagement.

"I also informed him that there was no automatic adjournment obtainable simply by sending an affidavit of actual engagement and making inquiries as to whether it had arrived. I further informed him that he was not granted an adjournment for the preceding [sic] scheduled for June 15, 1983. * * *" (40, 41)

Counsel for the Department noted its objection to any further adjournment, and, citing a decision of the Supreme Court, Nassau County, dated January 2, 1983, in *Matter of Walston v. Axelrod*, argued that counsel should have requested to be relieved of his obligation or should have engaged qualified associate counsel (42-44). He reasserted the Department's position that the appellant was collaterally estopped from raising the establishment issue (45).

The Administrative Law Judge stated that she had reviewed the prior proceeding and had found that the Castle Rest Nursing Home was established by the Board of Social Welfare on June 23, 1966 as a partnership; that the partnership broke up; that there was litigation resulting in an arbitration award in September, 1970 at which time Mr. Fahey's partnership interest was terminated, and that he was to receive $170,000 (49).

In March of 1971, she stated, Castle Rest applied for a change in establishment to have the certificate reflect that Jane and Walker McKinney were the operators and that application was approved in 1971 (50). On October 19, 1972, the real property was conveyed by McKinney to Castle Rest Facilities Corporation. Mr. Fahey was its sole stockholder. He thereafter applied for establishment approval.

In reliance upon *Spiegel v. Whalen*, 44 NY2d 745, 376 NE2d 1323 (1978), and *Hollander v. Whalen*, 68 AD2d 990, 414 NYS2d 808 (3d Dept 1979), she rejected appellant's claim and found that the issue of the "*ad infinitum* nature of Mr. Fahey's establishment approval * * * was before the Appellate Division when it considered its decision", and that it had been fully and fairly litigated (52). Based upon that finding, the failure of counsel or Mr. Fahey to appear on June 15, 1983 and the history of adjournment in the case, she stated that:

> "* * * a summary judgment motion has been granted as well as a default entered. This is a hybrid judgment, but I wish the Order to reflect that the record on appeal has been gone into and the issue that Mr. Scaccia raised as his absolute defense appears to be totally without merit." (54)

Appellant served motion papers dated July 27, 1983 for an order reopening the default upon the grounds that (214):

> "1. That the default herein was excusable.
>
> "2. That the respondent has a meritorious position in this proceeding.

"3. That the instant summary judgment was rendered without notice to the respondent."

Decision of the Administrative Law Judge (225).

Looking to the cases decided under New York Civil Practice Law and Rules 5015 (a) for guidance, the Administrative Law Judge found that a party may be relieved of a default upon a showing that the default was excusable and that a meritorious defense exists. She recounted the history of the adjournments in the case and of the communications in respect to the requested adjournment of June 15, 1983 which had been denied. She referred to New York case law as deciding that it was " '. . . unreasonable for both petitioner and her attorney to expect that legitimate interests of the People of the State of New York should be thwarted in order to accommodate his litigation calendar' " (228).

The Administrative Law Judge also stated that she was giving great weight to whether appellant had a meritorious defense in considering whether to vacate the default. She reviewed the prior proceedings, as well as other litigation involving Castle Rest which had been relied upon by appellant, and applied the collateral estoppel bar, holding that "the issue of his continuing establishment * * * cannot now be relitigated" (233). Finding no merit to counsel's contentions that appellant enjoyed uninterrupted establishment since 1966, she denied the motion to vacate (234).

An order revoking appellant's operating certificate was signed on behalf of the State Commissioner of Health on October 12, 1983 (34). Appellant then commenced a proceeding pursuant to New York Civil Practice Law and Rules, Article 78, to review that determination of a public officer. He sought judgment:

"1) Reviewing annulling and revoking the order of the respondent Commissioner of Health dated October 12, 1983 granting judgment by default and summary judgment against petitioner on the merits;

"2) In the alternative, reviewing annulling and revoking the said order of the respondent commissioner of Health and directing the respondent to reinstate the administrative proceeding as an administrative proceeding to proceed to an administrative determination upon a full and complete administrative record after affording the petitioner the opportunity to be heard;

"3) * * * [a stay]."

The New York Supreme Court, Albany County, held, in an unreported decision:

"Petitioner was provided the opportunity for a full administrative hearing but he defaulted without adequately giving an excuse for his default or a meritorious defense. Further, the Administrative Law Judge decided on the merits that petitioner was barred by collateral estoppel; the same issues had previously been litigated up to the New York Court of Appeals.

"This Court, after carefully reviewing the record presented, decides that the respondent acted in accordance with the law on a rational basis and this Court will not disturb that decision (see *Matter of Howard v. Wyman*, 28 NY2d 434; *Pell v. Board of Education*, 34 NY2d 222)."

The New York Appellate Division, Third Judicial Department held (J.S., p A-2 [105 AD2d 537, 481 NYS2d 481 (1984)]):

> "Petitioner's primary contention is that he has a meritorious defense. This contention is wholly without merit since, contrary to petitioner's argument, the issue of his establishment approval was fully litigated in *Matter of Fahey v. Public Health Council, Dept. of Health of State of N.Y.* (*supra*). Accordingly, collateral estoppel bars petitioner from relitigating the issue of establishment approval; since an establishment approval is a prerequisite to retaining an operating certificate (*Matter of Speigel v. Whalen*, 44 NY2d 745; *Matter of Lap v. Axelrod*, 97 AD2d 583), respondent's determination has a rational basis.
>
> "We have examined petitioner's remaining contentions and find them lacking in merit. The judgment should, therefore, be affirmed."

A copy of its October 26, 1984 order is reproduced at page E-1, *infra*.

The New York Court of Appeals denied appellant's application for leave to appeal (J.S., p A-1), 64 NY2d 603, 475 NE2d 474 (1984).

Reasons for Granting the Motion.

The New York State Administrative Procedure Act provides that an adjudicatory proceeding may be disposed of

upon a default (§ 301 [5]).* In this case, the New York Appellate Division found appellant's contention "that he has a meritorious defense" to be "wholly without merit." In holding appellant's remaining contentions to be "lacking in merit", that court found appellant's default to be inexcusable. The entry of such a default after adequate notice, as is the case here, does not deny appellant due process of law. *Boddie v. Connecticut*, 401 US 371, 378 (1971); *Windsor v. McVeigh*, 93 US 274, 278 (1876). Whether a default after the giving of proper notice should be excused presents questions solely of state law, not federal law. New York courts have examined the proferred excuses and declined to open the default. That action does not present any federal question, much less a substantial federal question.

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*New York State Administrative Procedure Act § 301 (5) provides that:

"§ 301. Hearings.

"1. * * *

* * *

"5. Unless precluded by statute, disposition may be made of any adjudicatory proceeding by stipulation, agreed settlement, consent order, default, or other informal method."

CONCLUSION.

The appeal should be dismissed for want of a substantial federal question or, in the alternative, the order of the New York Appellate Division, Third Judicial Department, should be affirmed.

Dated: Albany, New York
May 17, 1985

Respectfully submitted,

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Order of the New York Appellate Division, Third Judicial Department, Entered October 26, 1984.

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department in the City of Albany, New York, commencing on the 4th day of September, 1984.

Present:

Hon. T. Paul Kane, Justice Presiding,
Hon. Robert G. Main,
Hon. Ann T. Mikoll,
Hon. Paul J. Yesawich, Jr.,
Hon. Norman L. Harvey, Associate Justices.

In the Matter of the Petition of THOMAS M. FAHEY, as Operator of Castle Rest Nursing Home,

Petitioner-Appellant,

against

DAVID AXELROD, M.D., as Commissioner of Health of the State of New York,

Respondent.

The appellant having appealed from a judgment of the Supreme Court at Special Term (Conway, J.), entered

March 20, 1984 in Albany County, which dismissed petitioner's application, in a proceeding pursuant to CPLR Article 78, to annul a determination of the Commissioner of Health revoking petitioner's operating certificate pursuant to section 2806 of the Public Health Law, and said appeal having been presented during the above-stated Term of this Court, and having been argued by Dante M. Scaccia, Esq., of Counsel for appellant, and by Alan W. Rubenstein, Assistant Attorney General, of Counsel for respondent, and after due deliberation, the Court having rendered a decision on the 18th day of October, 1984, it is hereby

ORDERED, that the judgment appealed from be and the same hereby is affirmed, without costs.

Enter:

/s/ MICHAEL J. NOVACK
Clerk

Dated and Entered: October 26, 1984

A True Copy
MICHAEL J. NOVACK
Clerk